

Anti-Doping Hearing Panel
of the
International Biathlon Union

Decision
in the matter of
Ms. Irina Starykh

The Anti-Doping Hearing Panel ("ADHP"), according to Article 8.1.3 IBU Anti-Doping Rules, in the composition of Christoph Vedder, Professor of Law, Munich, Germany (Chair), Walter O. Frey, Medical Doctor, Zurich, Switzerland, and Markus Manninen, Attorney-at-Law, Helsinki Finland tried the case of Ms. Irina Starykh and, having duly deliberated the facts and the law, renders the following decision:

I. Statement of Facts

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Ms. Irina Starykh ("the Athlete"), an athlete under the jurisdiction of the Russian Biathlon Union ("RBU"), was submitted to an out-of-competition doping control initiated by the International Biathlon Union ("IBU") on January 2, 2014 at Oberhof, Germany.

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The first analysis of the A sample of the Athlete was performed in January 2014 by the WADA accredited laboratory in Cologne and showed atypical results and, therefore, were stored for later re-analysis. Between 4 and 12 November 2014 the A samples A 3677070 collected on January 2, 2014 were re-analysed in the Cologne laboratory. The analysis revealed the presence of recombinant EPO. The Expert Opinion by the WADA accredited Seibersdorf Laboratories, dated November 10, 2014, confirmed the presence of exogenous EPO. The Cologne laboratory informed the IBU of the Adverse Analytical Finding ("AAF") under letter of November 17, 2014. The Documentation Package was sent to IBU under letter of December 19, 2014.

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By letter of November 25, 2014 the IBU Secretary General notified the RBU and the Athlete that the sample taken in Oberhof in January 2014, after a re-test was performed according to Article 6.5 IBU Anti-Doping Rules ("ADR"), resulted in an AAF. The Athlete was not suspended explicitly because she was already declared ineligible to compete for 2 years as of December 23, 2013 by decision of the ADHP of July 14, 2014 because of an Anti-Doping Rule Violation ("ADRV") occurred on December 23, 2013.

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By the said letter of November 25, 2014 the Athlete and the RBU were further notified of:

- the result of the analysis not being consistent with an applicable TUE
- the initial review conducted by the IBU not showing any apparent departure from the WADA International Standards for Testing and for Laboratories ("ISL")
- the initiation, by the IBU, of the result management process for a possible ADRV in the sense of Article 2.1. IBU ADR
- the right to request the analysis of the B sample or, failing such request, that the B sample analysis may be deemed waived
- the scheduled date, time and venue as well as the costs of the B sample analysis and the opportunity of the Athlete and/or her representatives as well as the representatives of the RBU to attend the B sample analysis
- the possibility to have a provisional hearing according to Articles 7.6.3, 7.6.1 IBU ADR.

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By letter of December 10, 2014 RBU, on behalf of the Athlete, waived her right to the B sample analysis.

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On January 8, 2015, the IBU Secretary General referred the matter to the ADHP.

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On February 2, 2015, according to Article 8.1.3 IBU ADR, the particular Panel to hear the Athlete's case was established.

II. Proceedings before the Anti-Doping Hearing Panel

1. The IBU ADHP

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According to Article 8 IBU ADR, the ADHP is the competent body to decide whether or not, in a given case, an ADRV was committed. According to Article 11.2 of the IBU Constitution and Article 8.1.8 IBU ADR, the decisions of the ADHP can be appealed directly to the Court of Arbitration for Sport in Lausanne, Switzerland.

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Although the ADHP is part of the institutional framework of the IBU and renders, in matters of alleged ADRVs, the final decision for the IBU, it acts in complete independence. As Article 8.1.1 IBU ADR states, "*(e)ach panel member shall be otherwise independent of IBU*". The Panel members appointed in the case pending have no prior involvement with the case.

2. The Proceedings before the Panel and the Submissions of the Parties

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Under letter of January 8, 2015 the IBU served to the Panel the documentation package of the laboratory and the full set of correspondence with the Athlete and the RBU. On the same day, the documentation package and other documents were sent to the RBU and the Athlete.

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By letter of February 2, 2015, directed to the RBU, the Chairman of the Panel reiterated the right of the Athlete to request a hearing and notified that a hearing could take place if explicitly requested by the Athlete no later than February 9, 2015. Furthermore, the Athlete was invited to submit a statement no later than February 16, 2015.

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Since no response was received within the set time-limit, the RBU was contacted by the IBU and, for the sake of fairness to the Athlete, the Panel, by letter of February 26, 2015, granted the RBU and the Athlete a second opportunity to request a hearing and to submit a statement no later than March 25, 2015.

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By letter of March 24, 2015, RBU forwarded an explanatory letter of the Athlete, dated March 12, 2015, together with an English translation to the Panel. She explained that her sample collected on January 2, 2014 was positive for the same reason as the one collected on December 23, 2013 which led to the imposition of a two years' period of ineligibility.

"I had no desire to trick anyone or to improve my athletic performance. I used injections for skin rejuvenation only and I couldn't imagine that these injections contained any prohibited substances."

She considered the positive sample

"a result of cosmetic procedures and it is my mistake that I didn't consult anybody before receiving these injections."

The Athlete further informed that she gave birth to a child on February 20, 2015 and, therefore, will be represented at the hearing by a representative. The Athlete requests that her period of ineligibility will not be extended as an "additional sanction" and the sample collected on January 2, 2014 not be acknowledged a repeated or systematic violation.

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On April 3, 2015 IBU was invited to respond no later than May 8, 2015. On May 8, 2015, within the time-limit, IBU filed a written statement which replaces the first statement dated February 16, 2015. IBU submitted that the rules applicable to the case are the ADR 2012 while the amended ADR 2015 may be applied as *lex mitior* to the extent they provide for milder sanctions.

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IBU claims that, based on the documentation of the A sample analyses, it has demonstrated the presence of recombinant EPO, a prohibited substance, in the Athlete's A sample which constitutes an ADRV under Article 2.1 IBU ADR and refers to the fact that recEPO is a non-specified substance which, according to S2.1 of the 2014 Prohibited List is prohibited both on in- and out-of-competition tests.

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IBU states that the Athlete, in her written explanation, did neither dispute the finding of an AAF nor that the analysis was performed in accordance with the applicable WADA standards. IBU concludes that the Athlete is guilty of an ADRV.

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IBU refers to the fact that the Athlete has been found guilty of an ADRV by a decision of the ADHP of July 14, 2014 and a period of two years' ineligibility was imposed on her commencing on December 23, 2013 which is still pending.

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In reply to the Athlete's written explanation IBU states the following:

- in the prior proceedings the Athlete had explained that the prohibited substance was included in a drug called LAENNEC, which she used for cosmetic reasons; the ADHP did not consider that as mitigating circumstances
- there is no evidence that the Athlete actually used LAENNEC
- there is no evidence that the application of LAENNEC caused the AAF
- the Athlete took the drug without any medical supervision or advice
- the two AAFs of December 23, 2013 and January 2, 2014 show that the Athlete applied EPO over a certain period of time during the qualification period for the Olympic Winter Games in Sochi.

IBU concludes that there are no mitigating circumstances.

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Since the ADRV which has led to the present proceedings has been committed before the ADHP had decided upon the prior ADRV on July 14, 2014 IBU, based upon Article 10.7.4 IBU ADR, concludes that these two violations together must be considered as one single first ADRV. IBU further concludes that the same standard sanction of two years must apply to both violations as neither of them is subject to a reduction because of mitigating circumstances.

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However, IBU suggests that

"the occurrence of multiple violations must be considered as a factor in determining aggravating circumstances (Art. 10.6 IBU ADR) which may lead to an additional sanction - as if the two violations had been adjudicated at the same time."

Although IBU proposes to increase the standard sanction it leaves that issue to the Panel:

"While the explanations of the Athlete how and why she applied EPO are not supported by any evidence and there are more likely explanations why an Athlete competing on her level was found positive on EPO twice shortly before the Olympic Games, it is advisable to increase the minimum standard sanction because of aggravating circumstances. The IBU prefers however to leave it to the ADHP to determine the appropriate additional sanction."

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With regard to the commencement of the sanction IBU refers to Article 10.9.2 IBU ADR and requests that the additional sanction

"shall be added to the already pending period of ineligibility, i.e. starting on the expiration of the sanction which was imposed by the previous ADHP."

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IBU's request for relief is:

"The Athlete shall be declared ineligible because of an Anti-Doping Rule Violation and aggravating circumstances according to Art. 10.2, 10.7.4 and 10.6 IBU ADR 2012, for an additional period of time to be determined by the ADHP starting on the expiration of the pending period of ineligibility (i.e. 24 December 2015)."

3. The Hearing

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The hearing took place on June 1, 2015 from 13.00 h until 15.35 h at the premises of the IBU at Salzburg. Present were

- on behalf of the Athlete: Mr Sergey Kostin, CEO of the RBU, and Mr Sergey Mnatsakanov, Head of International Relations Department of the RBU.
- on behalf of the IBU: Mrs Nicole Resch, Secretary General of the IBU, and Dr Michael Noth, Attorney-at-Law and counsel for the IBU.

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The Chairman opened the hearing by noting that the presence of the EPO in the Athlete's sample and the doping control process are not challenged by the Athlete. Further, upon request by the Chairman, the Parties confirmed that they did not have any observations on the current proceedings.

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IBU submitted its prayer for relief based on the following arguments:

- According to Article 2.1 of the IBU ADR, the Athlete has committed an ADRV.
- Because there are no mitigating circumstances, the standard sanction for the violation would be two years' ineligibility.

- The violation is the Athlete's second violation which shall, however, be considered a one single violation together with her violation based on a positive sample of December 23, 2013.
- It is very likely that the Athlete has administered EPO through at least two injections.
- The use of a prohibited substance on multiple occasions signifies aggravating circumstances governed by Article 10.6 of the IBU ADR.
- Therefore, the Panel shall order an additional sanction for a first single ADRV falling within the range of 2-4 years in accordance with Article 10.6 IBU ADR. Having noted that the joint sanction of four years should be used in most severe violations, the IBU left the matter for the Panel's consideration.

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The representatives of the RBU, in their capacity as the authorized representatives of the Athlete, submitted the request for relief and put forward the following arguments:

- The presence of the EPO in the Athlete's sample is acknowledged.
- There is no evidence of at least two injections.
- Because there is only one injection, the criterion of aggravated circumstances is not fulfilled.
- Because the Athlete is already serving a two-year ban because of her positive sample of December 23, 2013, caused by the same administration of EPO, no additional sanction shall be imposed.

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IBU requested that Dr. Gmeiner of Seibersdorf Laboratories be heard as an expert witness on the likelihood of the EPO administration revealed by the positive sample of December 23, 2013, having caused also the positive sample of January 2, 2014. After having carefully considered the IBU's request, the Panel rejected the request on the following grounds:

- IBU's request is belated since the IBU did not nominate Dr. Gmeiner as an expert witness in its submission of May 8, 2015.
- The Panel will decide the issue based on its experience and publicly available research.

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The Panel discussed the following issues with the parties:

- The existence of aggravating circumstances based on the potential administration of the EPO on multiple occasions.
- The application of Article 10.7.4 of the IBU ADR.

III. In Law

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The Panel considered the facts and the law as discussed in both the written proceedings and at the hearing.

1. Applicable Law

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The Athlete who operates under the jurisdiction of the RBU is bound by the IBU ADR which, according to their introductory "Scope"

"apply to the IBU, each national federation ... and each participant in the activities of the IBU or any of its national federations by virtue of the participant's membership, accreditation, or participation in IBU, its member federations, or their activities or Events."

Therefore, the IBU ADR are the law applicable to the dispute before the Panel.

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The law applicable consists of the rules in force at the time when the alleged ADRV was committed, i.e. on January 2, 2014. Hence, the IBU ADR as adopted in 2012 apply while the IBU ADR 2015, according to their Article 25 are in force only as of January 1, 2015. According to Article 20.7.2 IBU ADR 2015, the new rules have no retroactive effect except for a possible *lex mitior* which, however, cannot be found applicable to the present case.

2. Anti-Doping Rule Violation

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Doping, by virtue of Article 1 IBU ADR, is defined as the occurrence of one of the ADRV set forth in Article 2 IBU ADR.

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According to Article 2.1 IBU ADR,

“the presence of a prohibited substance or its metabolites or markers in an Athlete’s sample”

constitutes an ADRV. The prohibited substances are contained in the WADA Prohibited List which, according to Article 4.1 IBU ADR, is incorporated to the IBU ADR.

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The 2014 Prohibited List, which applied at the time of the sample collection, under S2.1 lists “*erythropoietin (EPO)*”.

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According to Article 6.5 IBU ADR, IBU has the authority to re-analyse samples. The re-analysis of the Athlete’s A sample performed in November 2014 showed the presence of recombinant EPO. This analysis too has to be, and was conducted in conformity with the ISL.

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In a situation where the Athlete waived the analysis of the B sample, the finding of a prohibited substance in the Athlete’s A sample, according to Article 2.1.2 IBU ADR, establishes sufficient proof of an ADRV.

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Based upon the laboratory’s documentation including the Expert Opinion by Drs. Gmeiner and Reichel of Seibersdorf Laboratories, the IBU has discharged its burden of proving that an ADRV occurred “*to the comfortable satisfaction*” of the Panel, according to Article 3.1 IBU ADR. According to Article 3.2.1 IBU ADR, WADA accredited laboratories are presumed to have conducted the sample analysis in accordance with the ISL. The initial review in the course of the results management conducted by the IBU did not reveal any departure from the ISL.

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The Athlete, in her written explanation and at the hearing, did not challenge the finding of the AAF nor did she claim that a departure from the ISL occurred which could have reasonably caused the AAF.

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Therefore, the presence of recEPO, which is a prohibited substance listed under S2.1 of the Prohibited List, in the Athlete’s samples in the sense of Article 2.1 IBU ADR has been proven. According to Article 2.1.1 IBU ADR, no intent, fault, negligence, or knowing use is required in order to constitute an ADRV.

4. Sanction for the ADRV committed on January 2, 2014

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For a first ADRV in the form of the presence of a prohibited substance Article 10.2 IBU ADR provides a regular sanction of two years' ineligibility.

5. Elimination or Reduction of the Sanction

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However, if an athlete establishes by a balance of probability, as required by Article 3.1 IBU ADR, that, due to exceptional circumstances, he or she bears no significant fault or negligence Article 10.5.2 IBU ADR allows to reduce the period of ineligibility, but in the case before the Panel the reduced period may not be less than one year.

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In the event of an ADRV for the presence of a prohibited substance Article 10.5.2 IBU ADR specifically requires that the athlete establishes how the substance entered his or her body. The Athlete, in her Doping Control Form indicated "no" in the rubric for medication and supplements. In her written explanation and at the hearing the Athlete neither showed that the drug LAENNEC caused the AAF nor that she actually took it. The alleged lack of intention to cheat or to enhance performance is irrelevant. All the explanations provided by the Athlete do not allow the application of Article 10.5.2 IBU ADR here.

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Therefore, in the absence of exceptional circumstances which would allow the reduction of the sanction, the period of ineligibility to be imposed on the Athlete for the ADRV committed on January 2, 2014, taken alone, would be two years' ineligibility as set forth by Article 10.2 IBU ADR.

6. Multiple Anti-Doping Rule Violations

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However, prior to the proceedings presently before the Panel, the Athlete was found guilty of an ADRV in the form of the presence of EPO occurred on December 23, 2013 and determined by a decision of the ADHP of July 14, 2014 by which the Athlete was declared ineligible to compete for two years until December 22, 2015.

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For a second ADRV Article 10.7.1 IBU ADR provides:

"For a second anti-doping rule violation, the period of ineligibility will be within the range set forth in the table below."

As both the ADRV already determined by the decision of July 2014 and the one pending before the Panel form a violation of Article 2.1 IBU ADR and, as determined above, no mitigating circumstances occur, the table provides for a period of ineligibility between 8 years and a lifetime.

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The further condition set forth by Article 10.7.5 IBU ADR that each ADRV must take place within the same eight-year period is met, too. The ADRVs committed by the Athlete took place between December 2013 and January 2014.

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However, the ADRV presently under consideration occurred shortly after the one which was already resolved by the ADHP (on January 2, 2014 as compared to December 23, 2013) and before the earlier-in-time ADRV was notified to the Athlete (January 28, 2014) and adju-

dictated by the ADHP (July 14, 2014). The ADRV under consideration was notified to the Athlete as late as on November 25, 2014.

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Article 10.7.4 IBU ADR establishes "*additional rules*" of general application to "*certain potential multiple violations*". The situation before the Panel is covered by Article 10.7.4 IBU ADR which relates to the temporal relationship between a first and a second ADRV. Article 10.7.4 first indent IBU ADR applies when the first-in-time violation had not yet been adjudicated, i.e. when the second one is notified before the first one is determined by a decision.

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According to the second indent of Article 10.7.4 IBU ADR

"If, after the resolution of a first anti-doping rule violation, the IBU discovers facts involving an anti-doping rule violation by the athlete ... that occurred prior to the notification regarding the first violation, the IBU will impose an additional sanction based on the sanction that could have been imposed if the two violations had been adjudicated at the same time."

Since the ADRV committed on January 2, 2014, which is the subject matter of the present proceedings, occurred prior to the notification of the violation committed on December 23, 2013 which happened on January 28, 2014, the Panel has to examine whether the prerequisites to impose an *additional sanction* for the violation now pending are fulfilled.

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The *additional sanction* the Panel may impose must be

"based on the sanction that could have been imposed if the two violations had been adjudicated at the same time."

Hence, the Panel finds itself in the situation to hypothetically adjudicate both the ADRV committed on December 23, 2013 and on January 2, 2014 at the same time, assuming that the first decision had not been made.

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It follows from the rationale of Article 10.7.4 first indent IBU ADR that an ADRV is considered a second one exclusively if it occurs after the previous one had been notified to the athlete, already. Although the time span between the two violations only amounts to 10 days the second-in-time one was notified not before November 25, 2014 because it was detected in a re-analysis only. In such situation, according to Article 10.7.4 first indent IBU ADR, the second-in-time ADRV cannot be considered a second ADRV rather than part of one single ADRV.

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Hence, the Panel, in order to calculate the additional sanction, must hypothetically determine a sanction for both violations considered as one single violation. According to the rationale of Article 10.7.4 second indent, sentence 2 and 3 IBU ADR, which however, due to the lack of an admission does not apply presently, and of the last sentence of the first indent

"the occurrence of multiple violations may be considered as a factor in determining aggravating circumstances (Article 10.6)."

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Article 10.6 IBU ADR provides:

"If the IBU establishes in an individual case involving an anti-doping rule violation other than violations under Article 2.7 (Trafficking) and 2.8 (Administration) that a g-

gravating circumstances are present that justify the imposition of a period of ineligibility greater than the standard sanction, then the period of ineligibility otherwise applicable will be increased up to a maximum of four years unless the athlete ... can prove to the comfortable satisfaction of the hearing panel that he or she did not knowingly violate the anti-doping rule."

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The *Comment to Article 10.6* IBU ADR lists as examples for aggravating circumstances amongst others:

"the athlete ... used ... a prohibited substance ... on multiple occasions".

Because the existence of aggravating circumstances in the case at hand requires that the positive sample collected on January 2, 2014 is not a result of the EPO administration revealed by the positive sample of December 23, 2014 but caused by another administration, it is imperative for the Panel to examine whether the two positive samples of December 23, 2013 and January 2, 2014 may have been caused by two or more EPO administrations denoting the use of a prohibited substance on multiple occasions.

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According to the IBU, it is very likely that the Athlete has injected EPO at least twice to cause two positive samples. In the Panel's knowledge, the state-of-the-art administration of EPO indeed involves frequent injections of very small doses of EPO. The Athletes wishing to avoid a positive doping test would not use large doses, among other reasons in order to keep the EPO concentration low. It is very unlikely that a normal dose of EPO administered in a carefully planned doping program causes an AAF after 10 days from the injection. It is possible, even likely, that the Athlete, who competed at the highest international level, had access to such a sophisticated method.

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Further, the half-life of EPO is short i.e. it will disappear from the human body relatively quickly. A dose of EPO, depending on the quality and quantity of the EPO may vanish from the system within days, or even hours. Finally, the Panel notes that the Athlete has in its written submission dated March 12, 2015 declared that she *"used injections"* - i.e. various shots - for skin rejuvenation. All these factors support the IBU's view that the Athlete used EPO on multiple occasions in a 10-day period, constituting aggravating circumstances in the sense of Article 10.6 IBU ADR. The Athlete's allegation during the oral hearing that there was only one injection is not only in contradiction with her previous statements on several injections, but also belated due to the explicit prohibition of presenting new arguments set by the Panel's order of procedure dated May 28, 2015.

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Because it is the IBU who has invoked aggravating circumstances, it has the onus to prove the use of EPO *"on multiple occasions"* by the Athlete as required by Article 10.6 IBU ADR and its Comments. The Panel notes that the IBU has established the existence of two ADRVs. Based on the aforementioned grounds, the Panel is comfortably satisfied that the Athlete had repeatedly i.e. at least twice in the 10-day period administered EPO to improve her athletic performance in the upcoming competitions. It follows that the prerequisite of the use of a prohibited substance on multiple occasions is fulfilled. Therefore, there are aggravating circumstances in the sense of Article 10.6 IBU ADR. According to that rule

"the period of ineligibility otherwise applicable will be increased up to the maximum of four years ..."

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Based on the foregoing considerations the Panel concludes that there are grounds to impose a hypothetical sanction of three years of ineligibility which corresponds with the

blameworthiness of the Athlete's conduct. Therefore, the *additional sanction* to be imposed by the Panel in the case before it, by virtue of Article 10.7.4 second indent IBU ADR, which must be *based on* the hypothetical sanction, amounts to one year of ineligibility.

7. Disqualification of results

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According to Article 10.8 IBU ADR, also in the event of an out-of-competition test,

“all ... competitive results obtained from the date a positive sample was collected ..., through the commencement of any provisional suspension ... will, unless fairness requires otherwise, be disqualified ...”

In the present case, however, the results obtained by the Athlete as of December 23, 2013 have already been disqualified by the decision of the ADHP of July 14, 2014. Therefore, and considering that the positive sample under investigation here was given on January 2, 2014, the Panel needs not to consider this issue.

8. Commencement of the Period of Ineligibility

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According to Article 10.9 IBU ADR 2012, the period of ineligibility shall commence on the date of the decision of the Panel. However, as provided for in Article 10.9 IBU ADR, the time of a provisional suspension is to be credited against the period of ineligibility ultimately imposed. On the occasion of the notification of the AAF on November 25, 2014 no provisional suspension was imposed on the Athlete because she was already declared ineligible to compete by decision of the ADHP dated July 14, 2014. Therefore, no period of suspension is to be credited against the sanction imposed by this decision.

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It follows from the very nature of an *additional sanction* in the meaning of Article 10.7.4 IBU ADR that the period of ineligibility imposed as an *additional sanction* shall start on the date the pending period of ineligibility had expired, i.e. on December 23, 2015,

IV. Conclusions

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The A sample collected from the Athlete on the occasion of out-of-competition test conducted on January 2, 2014 at Oberhof revealed the presence of recombinant EPO which is a prohibited substance on the WADA Prohibited List and, therefore, the Athlete committed an ADRV according to Article 2.1 IBU ADR. For that violation, taken alone, in the absence of any exceptional circumstances the Athlete would have to be declared ineligible for a period of two years, commencing on the day of this decision.

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However, due to the sequence of the events, the ADRV under consideration together with the ADRV committed by the Athlete on December 23, 2013 shall be considered one single ADRV. Because of aggravating circumstances i.e. the use of a prohibited substance on multiple occasions, a hypothetical sanction of 3 years should be determined.

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Therefore, the *additional sanction* the Panel has to impose by this decision shall be one year of ineligibility commencing on the day of the expiration of the pending sanction, i.e. on December 23, 2015.

V. Decision

On these grounds the Panel decides that:

1) Ms Irina Starykh committed an ADRV on January 2, 2014 which, together with the ADRV occurred on December 23, 2013 and adjudicated by the decision of the ADHP of July 14, 2014, is considered one single ADRV.

2) As an additional sanction, Ms Starykh shall be ineligible to compete for one year commencing on December 23, 2015.

The Anti-Doping Hearing Panel

June 30, 2015



Christoph Vedder
Chairman of the Panel



Walter O. Frey
Member of the Panel



Markus Manninen
Member of the Panel